

M e m o r a n d u m

To: Mr. Richard Johnson, Deputy Director
Property Taxes Department

Date: March 3, 2000

From: Mary Ann Alonzo
Sr. Tax Counsel

Subject: *Definition and Guidance Relative to the Recorded Deed Restriction Requirement of Section 214, Subd. (g)*

In response to your request, this memorandum defines the term, “deed restriction”, and provides guidance on how claimants can meet the requirement of a “recorded deed restriction.” For purposes of subd. (g) of section 214, legal staff’s research indicates that: (1) an enforceable restriction on the use of property cannot be created unilaterally by a single landowner; and, (2) the “recorded deed restriction” requirement may be met by two parties entering into a personal covenant or contract that is recorded in the county where the low income housing project is situated.¹

LAW AND ANALYSIS

Assembly Bill 1559 (Chapter 927, effective October 10, 1999) amended subdivision (g) of section 214 of the Revenue and Taxation Code, to require, among other things, that rental housing properties for lower-income households be restricted by recorded deed restrictions to be eligible for the welfare exemption. The owner must certify and ensure that there is either: (1) an enforceable and verifiable [regulatory] agreement with a public agency; or, (2) a “recorded deed restriction, that restricts the project’s usage and that provides that the units designated for use by lower income households are continuously available to or occupied by lower income households at rents that do not exceed those prescribed by Section 50053 of the Health and Safety Code,” or, in the case of a conflict with the terms of government financing, rents that do not exceed those prescribed by the terms of the financing. (Section 214, subd. (g)(2)(A).)

I. Definition of a Deed Restriction

A deed is an instrument [writing] by which a person [grantor] grants or conveys real property to another [grantee].² The term, “restriction,” refers to a limitation on the use of

¹ This memo will not address the problem that the statutory amendment to section 214, subd. (g)(2)(A) necessitated recordation of the deed restriction prior to the January 1, 2000 lien date, to avoid loss of the exemption for this year for all such properties that also did not have an enforceable and verifiable agreement with a public agency.

² Blacks Law Dictionary, 5th Ed., page 373.

property, often imposed in a deed or lease.³ A provision in a deed limiting the use of the property is a restrictive covenant.⁴ Language that restricts a property to use as low income housing and provides that the units designated for use by qualified lower income households are continuously available to or occupied by such tenants is a “restrictive covenant.”

II. Kinds of Deed Restrictions

A. Background

Historically, there have been three distinct categories of restrictions or servitudes – easements, covenants [running with the land], and equitable servitudes.⁵ An easement, which is an interest in the land of another giving its owners the right to use another’s property or to prevent the use of property by its owner, is not applicable here.⁶ Covenants and equitable servitudes are used most commonly to enforce uniform building restrictions [CCR’s or covenants, conditions and restrictions] under a general plan for the purpose of promoting uniform development of subdivisions or other restricted planned developments.⁷ As will be discussed below, neither covenants running with the land nor equitable servitudes can be used to satisfy the deed restriction requirement in this situation. Both have legal requirements that, in most instances, cannot be satisfied by the owners of low-income housing.

B. Personal Covenants

When a deed restriction is not enforceable as a covenant running with the land nor as an equitable servitude, it may be enforceable as a personal covenant or contract between parties.⁸ As a mere personal obligation, a personal covenant is not required to adhere to the statutory requirements of a covenant running with the land or to meet the judicial standard of an equitable servitude. A personal covenant is enforceable at law only against the original parties thereto.⁹ As such, personal covenants are not intended to have any binding effect beyond the immediate parties to the agreement. The courts view their purpose primarily as beneficial to an individual rather than to property.¹⁰ For example, a covenant/written contract to pay the agreed price for the purchase of real estate is personal since it is not for the benefit of the property conveyed.¹¹

³ Blacks, supra at page 1182.

⁴ Blacks, supra at page 1182.

⁵ Powell on Real Property, Vol. 9, § 60.01.

⁶ Miller & Starr, *Current Law of California Real Estate* (2nd Ed., Easements, § 18:4-5, p.252).

⁷ Covenants and Equitable Servitudes in California (1978) 29 Hastings L.J., 545, 553-573.

⁸ Cal Jur 3rd Ed., Vol. 26, Declaratory Relief to Deeds, § 236; Witkin, supra, § 485; *Miller McCaffrey v. Preston* (1984) 154 CA3d 422, 436-437.

⁹ *Los Angeles Terminal Land Co. v. Muir* (1902) 136 C. 36, 42.

¹⁰ Cal Jur 3rd Ed., Vol. 26, supra, § 236, pages 538-539; Witkin, supra, § 485, pages 662-663.

¹¹ *Lisenby v. Newton* (1898) 120 C 571, 573.

In our opinion, a low income housing project operated by two entities, a limited partnership and a qualified nonprofit managing general partner, may satisfy the “recorded deed restriction” requirement by entering into a personal covenant with the nonprofit managing general partner and recording it. An example of a personal covenant that would meet the requirements of section 214 (g)(2)(A) is attached. If the limited partnership/owner of the real property failed to comply with the restriction on the use of the property for low income housing, the nonprofit managing general partner would have a cause of action based on contract law principles.

C. Covenants

A covenant is an enforceable agreement or promise by one party to do or refrain from doing an act; the act generally concerns the use of the land of the person making the promise, and it affects the land of the party to whom the promise is made.¹² Civil Code section 1468 provides for the creation of covenants between owners of separate properties or in a single property situation between a grantor and a grantee of the land conveyed. Generally, property is conveyed without such restrictions, and section 1468 of the Civil Code provides that covenants are enforceable only by a party who has an interest in the property or properties subject to the covenant. When property is conveyed subject to a grantor’s covenant, the grantee/covenantee has the right to enforce the promise.¹³ The covenant is binding on future owners of the property or properties, and is said to “run with the land” if the covenant meets the statutory requirements set out in section 1468 of the Civil Code.¹⁴

Thus, under Civil Code section 1468, the covenantor and covenantee either must be owners of separate properties at the time the covenant is made or a grantor and grantee of land conveyed. This requirement is rarely, if ever, satisfied in the low income housing situation, where there is no other property owner with whom to covenant; nor is there in the instances that we have seen, grantor/grantee situations in which property is being conveyed subject to a covenant. Thus, the recorded deed restriction requirement added to section 214, subd. (g)(2)(A) would almost never be a covenant running with the land.

¹² Miller & Starr, *supra*, § 22.1, p.520.

¹³ Miller & Starr, *supra*, § 22.1, pages 520-530.

¹⁴ Civil Code § 1468, as originally enacted in 1905, applied only to covenants between owners of separate property, however, it was amended in 1968/1969 to apply to a covenant between an owner of land with the grantee of the land conveyed. Prior to 1968, such covenants between grantor and grantee were enforced by the courts as equitable servitudes.

D. Equitable Servitudes

When a covenant does not run with the land because it lacks an essential requirement in section 1468 of the Civil Code, or though enforceable under the Civil Code, damages would be an inadequate remedy, it may be enforceable as an equitable servitude.¹⁵ The underlying principle of an equitable servitude is that a landowner's promise to refrain from particular conduct pertaining to land creates in the beneficiary of that promise "an equitable interest in the land of the promisor."¹⁶ Under the judicial doctrine of equitable servitudes, the courts may enforce a promise pertaining to the use of land even though the person who made the promise has transferred the land to another,¹⁷ provided that: (1) the person bound by the restrictions had constructive¹⁸ or actual notice of their existence; (2) the intention that the promises are for the benefit of individual property owners is expressly set forth in the original deed; (3) the land affected by the restrictions [dominant tenement] is identified; and, (4) such restrictions are reasonable.¹⁹ If these conditions are met by the CC& R's of a residential subdivision, the initial grantee who received the first deed from the developer, as well as subsequent grantees are entitled to enforce the equitable servitude as to parcels restricted pursuant to a general plan of real estate development.

Thus, the creation of an equitable servitude generally contemplates a subdivision or planned development involving multiple owners of land and separate parcels that will be benefited and/or burdened. As noted above, in the low income housing situation, there is no other property owner with whom to enter into a promise, nor is there more than one property. Accordingly, the deed restriction contemplated by the legislative revision to section 214, subd. (g)(2)(A) is not enforceable as an equitable servitude.

III. Conclusion

In summary, deed restrictions on the use of property cannot be created unilaterally by an owner of real property under California law. Accordingly, an owner of a low income housing project such as a nonprofit charitable and/or religious corporation, would not be able to meet the "recorded deed restriction" requirement by recording a new deed in which it *unilaterally* imposed the restriction on its property required under section 214, subd. (g)(2)(A).

¹⁵ Witkin, *supra*, § 493, pages 670-671; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 375.

¹⁶ *Nahrstedt*, *supra* at page 379, citing Rest., Property, § 539.

¹⁷ *B.C.E. Development, Inc. v. Smith* (1989) 215 C.A.3d 1142, 1146, the general rule is that restrictions are unenforceable by a party who does not own any of the property intended to be benefited, but developer's successor, homeowners' association, has standing to enforce CC&R's [equitable servitude].

¹⁸ *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 368, setting new precedent that reference in deed no longer required to bind subsequent owner/purchaser if common plan (CCR's) for subdivision stating intent to bind purchasers is recorded before sale of property.

¹⁹ Witkin, *supra*, § 499-502; Miller & Starr, *supra*, § 22:7-22:12; Civil Code § 1354 governing enforceable equitable servitudes as to common interest developments.

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As noted above, section 214, subd. (g)(2)(A), as amended, provides that the claimant can meet the new requirement with either "an enforceable and verifiable [regulatory] agreement with a public agency or a recorded deed restriction." It is problematic that such claimants which cannot meet the "recorded deed restriction" requirement and also do not have an enforceable and verifiable regulatory agreement with a public agency, will lose the exemption for their properties.

The "recorded deed restriction" requirement can be met by low-income housing projects operated by two entities, a limited partnership and a nonprofit managing general partner may enter into a personal covenant and record it. While such covenant would not be enforceable against subsequent owners of the property, it is our opinion that this is not necessary in the low income housing situation. As noted above, the statutory requirement can be satisfied with either document because regulatory agreements executed between low income housing owners and government agencies also contain the restriction that the property must be used for qualified low income tenants. Such regulatory agreements are essentially contracts that are binding only on the parties thereto. Thus, such agreements also are not enforceable against subsequent owners.

If you have any questions about this opinion, please do not hesitate to contact me at 324-1392.

MAA:tr

prop/precnt/welexqal/00/12maa

Attachment

Cc: Mr. Larry Augusta, MIC:82

Mr. David Gau, MIC:64

Mr. Peter Gaffney, MIC:64

Example of Deed Restriction in Compliance with Section 214, Subd. (g)(2)(A)

This agreement is entered into between _____, a California nonprofit corporation and _____, a California Limited Partnership with the intent of restricting the use of the property located at _____(address/assessor's parcel no.) for rental to qualified low income households, as defined by section 50079.5 of the Health and Safety Code.

The parties hereto agree that the portion of this property currently used for rental to qualified low income households will continue to be used solely for this purpose. It is our intent that the units designated for use by lower income households will be continuously available to or occupied by lower income households at [rents that do not exceed those prescribed by Section 50053 of the Health & Safety Code.] This agreement shall be recorded with the _____ County Recorder.

(Non-profit Corporation)

(Limited Partnership)

Dated_____

*In the situation where the terms of the housing project's federal, state, or local financing or financial assistance conflicts with the rent levels prescribed by Section 50053, the following language would be substituted for the language above in brackets: "at rents that do not exceed those prescribed by the terms of the project's financing or financial assistance."